



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL CASE NO. 3 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SALIM KALIMBO NYAWA alias MSANII.....1<sup>ST</sup> ACCUSED**

**ERNEST URUNZI MURABU alias NDEGWA.....2<sup>ND</sup> ACCUSED**

**MWANAIKI CHIMAKO.....3<sup>RD</sup> ACCUSED**

**RULING**

1. The 3 Accused persons are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence are that on 20.1.19 at Kwanyanje Village, Kasemeni Location in Lunga Lunga Sub-County, within Kwale County, they jointly murdered one Adam Kimani Gichamba. Upon pleading not guilty, they all applied to be released on bond pending trial.

2. Their application for bond was opposed vide an affidavit sworn on 19.2.19 by PC Richard Bore, the investigating officer in the matter. He avers that the Police are apprehensive that the Accused are likely to flee to neighbouring Tanzania. Given the gravity of the offence and penalty attached to it, the Accused are likely to abscond trial. Further, the eye witness of the occurrence of the offence is a close associate of the Accused and is unlikely to attend Court should the Accused be released on bond before he testifies.

3. For the 1<sup>st</sup> Accused and 3<sup>rd</sup> Accused, it was denied that they are a flight risk. They live in Mabambarani with their 5 children the eldest of whom is 8 years old while the youngest is 1 ½ years old and they are expecting their 6<sup>th</sup> child. The 1<sup>st</sup> Accused was even arrested at home. The 1<sup>st</sup> Accused sells used clothes in Likoni and is sole breadwinner of the family. His ancestral home is at Mwenzamwenye in Lunga Lunga and the residents have confirmed that he has interests there. It was further submitted that bond is a constitutional right and there were no compelling reasons to deny the 1<sup>st</sup> and 3<sup>rd</sup> Accused bond.

4. For the 2<sup>nd</sup> Accused, it was submitted that he is an old man and has lived in Kenya all his life. He has no relatives in Tanzania and no evidence has been produced to show that he plans to leave Kenya. He lives with his family and his youngest child is in class 7 and relies on his father for school fees. He will comply with all bond terms.

5. Article 49 (1) (h) Article 49 of the Constitution guarantees to an arrested person the right to be released on reasonable bond terms pending trial as follows.

**1. An arrested person has the right—**

**h. to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.**

6. It must be noted that the Accused persons herein are deemed innocent until proven guilty. When considering their application for bond, this Court is called upon to weigh their right to bond against the collective interest of the community. This was succinctly articulated by Mativo, J. in the case of Republic v Danford Kabage Mwangi [2016] eKLR:

**Granting bail entails the striking of a balance of proportionality in considering the rights of the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. The cornerstone of the justice system is that no one will be punished without the benefit of due process. Incarceration before trial, when the outcome of the case is yet to be**

**determined, cuts against this principle. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and punitive**

7. In the present case, the reasons advanced for opposing bond is that the Accused may interfere with witnesses. Further the State is apprehensive that because the Accused persons reside in the border town of Lunga Lunga in Kwale County, there is a likelihood of them crossing over to Tanzania never to be seen again. This Court must determine whether these are compelling reasons that warrant the denial of bond to the Accused persons. In Republic v Joktan Mayende & 3 others [2012] eKLR, Gikonyo, J had this to say about compelling reasons:

**And accordingly, the phrase *compelling reasons* would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution.**

8. To assist the Court in making a determination, the Probation and Aftercare Service prepared pre-bail reports for the Accused persons. As regards the 1<sup>st</sup> Accused the pre-bail report indicated that he has been mostly away at work and his abode at Likoni could not be established. The report stated that the 3<sup>rd</sup> Accused may not be suitable for immediate release.

9. For the 3<sup>rd</sup> Accused person, the pre-bail report indicated that she and her husband the 1<sup>st</sup> Accused acquired land neighboring that of the victim and lived there for a year. The 3<sup>rd</sup> Accused who is in her 3<sup>rd</sup> trimester of pregnancy is well known to her area chief. Her brother has agreed to have her move to her maiden home and to take care of her during trial.

10. As regards the 2<sup>nd</sup> Accused, the pre-bail report indicated that he is 66 years old. He was working as the caretaker of the victim's mother's piece of land and lived with the victim thereon. He purchased a piece of land in Mabambarani where he put up a home where he resides with his wife and 5 children. He is well known in the community.

11. I have considered the submissions by parties as well as the pre-bail reports. On the issue of the Accused being a flight risk, other than stating that there is a likelihood of the Accused fleeing to Tanzania because they live in the border town, no evidence of this likelihood has been placed before the Court to support this apprehension. To deny them bail based only for the reason that they live in a Lunga Lunga would in my view result in profiling persons who live in border towns as flight risks. I am therefore not satisfied that this is a compelling reason to deny the Accused persons bond.

12. The 2<sup>nd</sup> and 3<sup>rd</sup> Accused are said to be well known in the community and it is known where they will be residing if released on bond. Further the 3<sup>rd</sup> Accused person has children of tender years who require the care, protection and nurture of their mother. The 2<sup>nd</sup> Accused is a senior citizen and lives with his family. As regards the 1<sup>st</sup> Accused, the Court notes that the State and the pre-bail report indicate that he is of no fixed abode. The apprehension by the State in my view can be assuaged by stringent bail terms. The Accused persons have all indicated that they will dutifully abide by whatever bond terms will be imposed.

13. The Court notes the gravity of the offence the Accused are charged with as well as the severity of the sentence the offence carries. However, they have a constitutional right to be released on bond unless there are compelling reasons not to. Further, the Accused persons have a right to presumption of innocence until the contrary is proved. Having considered all factors herein, I am not persuaded that the reasons given by the state are forceful and convincing as to make the Court feel very strongly that the Accused should not be released on bond.

14. Accordingly, I admit the 3 Accused persons to bond on the following terms:

- i. The 1<sup>st</sup> Accused person Salim Kalimbo Nyawa alias Msanii be and is hereby released on a bond of Kshs. 1,000,000/= and one surety of a similar amount;
- ii. The 2<sup>nd</sup> Accused person Ernest Urunzi Murabu alias Ndegwa and the 3<sup>rd</sup> Accused person Mwanaidi Chimako be and is hereby released on a bond of Kshs. 500,000/= and one surety of a similar amount each;
- iii. The sureties shall be approved by the Deputy Registrar of this Court.
- iv. The 3 Accused persons shall attend Court on all dates as shall be fixed from time to time during the pendency of this trial, failure to which warrant of arrest shall be issued against them.
- v. The 3 Accused persons shall not contact or in any way interfere with the witnesses in this case and if they do so, the bond herein shall be cancelled.

**DATED, SIGNED and DELIVERED in MOMBASA this 3<sup>rd</sup> day of June 2019**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... for the Prosecution

..... for the 1<sup>st</sup> Accused

..... for the 2<sup>nd</sup> Accused

..... for the 3<sup>rd</sup> Accused

..... Court Assistant